No. 03-936

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

PETER MELZER,

Petitioner,

-v.-

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, CAROL A. GRESSER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Whether the United States Court of Appeals for the Second Circuit correctly determined (a) that the efficacy of petitioner's First Amendment claim is properly assessed by reference to the balancing test enunciated in *Pickering v. Board of Education*, 391 US 563 (1968)("*Pickering*"), and (b) that, pursuant to that test, respondents demonstrated that the disruption and reasonably anticipated disruption directly attributable to media accounts of petitioner's active membership in the North American Man/Boy Love Association ("NAMBLA") was sufficient to outweigh the First Amendment value of petitioner's activities?

LIST OF PARTIES

In addition to those listed in the caption, the following were named as defendants in the Courts below: IRENE IMPELLIZERI, VICTOR GOTBAUM, MICHAEL J. PETRIDES, LUIS O. REYES, NINFA SEGARRA, DENNIS M. WALCOTT, individually and in their official capacities as members of the Board of Education of the City School District of the City of New York; RAMON CORTINES, individually and as Chancellor of the City School District of the City of New York; JOSEPH DeJESUS, individually and as Superintendent of the Bronx High Schools; HOLLIS NEEDLEMAN, individually and as Assistant Superintendent of the Bronx High Schools; EDWARD STANCIK, individually and as Special Commissioner of Investigation for the New York City School District; and THE CITY OF NEW YORK.

TABLE OF CONTENTS

Page

COUNTER STATEMENT OF THE QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

COUNTER STATEMENT OF FACTS 2

REASONS FOR DENYING THE PETITION

A. The *Pickering* balancing test is appropriately applied to a government employee's First Amendment activities notwithstanding that they occur "outside the workplace and [are] unconnected to it." 13

B. The Second Circuit correctly failed to "perceive an impermissible heckler's veto implicated in this case." Rather, public knowledge of petitioner's "association and his degree of involvement in NAMBLA" caused "internal disruption to the operation of the school ... justifying the Board's action terminating him." 18

C. The Second Circuit correctly determined that respondents had carried their burden of demonstrating the reasonable likelihood of internal "disruption to the school's mission and operations" attributable to public knowledge of petitioner's active involvement in NAMBLA. 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases:

Berger v. Battaglia,
779 F2d 992 (4th Cir. 1985),
cert. denied, 476 US 1159 (1986).....19

Connick v. Myers,
461 US 138 (1983).....22

Flanagan v. Munger,
890 F2d 1557 (10th Cir. 1989) 19

Lewis v. Cowen,
165 F3d 154 (2d Cir.),
cert. denied, 528 US 823 (1999).....15

Pappas v. Giuliani,
290 F3d 143 (2d Cir. 2002), *cert. denied sub nom*
Pappas v. Bloomberg, __ US __, 156 L Ed 2d 657,
123 S Ct. 2642 (2003).....13, 14, 15, 20

McMullen v. Carson,
754 F2d 936 (11th Cir. 1985) 16

Melzer v. Board of Education,
336 F3d 185 (2d Cir. 2003)..... passim

Pickering v. Board of Education,
391 US 563 (1968)..... passim

Sims v. Metropolitan Dade County,
972 F2d 1230 (11th Cir. 1992) 16

Tindle v. Caudell,
56 F3d 966 (8th Cir. 1995) 15

United States v. National Treasury Employees Union,
513 US 454 (1995) 17

Waters v. Churchill,
511 US 661 (1994).....21

Weicherding v. Riegel,
160 F3d 1139 (7th Cir. 1998) 15

Statutes:

New York Education Law, section 3020-a 2n.2

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's unanimous opinion in this case. That opinion is reported at *Melzer v. Board of Education*, 336 F3d 185 (2d Cir. 2003)("*Melzer*"), and is reproduced in the appendix to the petition at pages 45a through 69a. In an order entered September 26, 2003, the Second Circuit panel that decided the appeal unanimously denied petitioner's petition for rehearing. The order further noted that upon petitioner's petition for rehearing en banc, "no ... judge has requested that a vote be taken thereon."

COUNTER STATEMENT OF FACTS

Respondents adopt, and respectfully refer the Court to, the Background portion of the Second Circuit's opinion. 336 F3d at 189-92 (47a-53a).[1] In light of the Second Circuit's conclusion that "the disruption [petitioner's activities] caused is great enough to warrant the school's action against him" (336 F3d at 198 [65a]), and because the first two of petitioner's questions implicate the issue of disruption, we highlight the following portions of the record before the Second Circuit:

Thomas Galasso, the principal of Bronx High School of Science ("Bronx Science"), testified that following the public disclosure of petitioner's active membership in NAMBLA, he obtained student reaction "just going through the building or the cafeteria" (Tr. 170).[2] Some boys, Galasso said, made graphically clear "that they would not be very happy about [petitioner] being their teacher" (Tr. 178). Speaking of student reaction, Galasso said (Tr. 199-200):

> "[T]hey would not want to be in a classroom with somebody who had ... that kind of value system that they could advocate adults

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[1] Parenthetical references appearing as "__a" are to pages of the appendix annexed to the certiorari petition.

[2] As noted by the Second Circuit (336 F3d at 192 [53a]), after respondent Board of Education determined that there was probable cause for the charges preferred against him, petitioner elected to challenge that finding at a hearing before an Arbitrator pursuant to New York Education Law, section 3020-a (see, 2a [note 2]). Parenthetical references appearing as "Tr. __" are to pages of the transcript of that hearing. Upon the agreement of the parties, "the testimony and evidence adduced at the hearing, as supplemented by Melzer's in-court testimony ... constitute[d] the trial record before the [District] Court" (3a).

> having sex with young boys. The notion was expressed that it would be hard to concentrate in a classroom if you knew the teacher ... belonged to an organization and might be having thoughts ... that were not appropriate. Those kinds of things were expressed. At other times ... they went to the point of being graphic about the kind of sex that men and boys might have and indicating that they were repulsed by that notion."

Regarding students' inability now to see petitioner as "sexually neutral," Galasso said (Tr. 200):

> "[I]t could affect them just in the learning process, if they are thinking about something that is repugnant to them, it might make it more difficult for them to learn the physics that they are supposed to be learning. Beyond that, a student might be reluctant to approach [petitioner] after class and ask a question about something that is bothering him regarding the physics because he might fear that other students would think that there is something going on between him and [petitioner]."

Galasso concluded that petitioner should not return to the classroom. He said (Tr. 201, 216-17):

> "It just seems to me that the publicity ... about the organization and [petitioner's] association with it had so many negatives associated with the teaching/learning situation that I just thought it would be intolerable[.]
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> * * *
>
> "That the values that are portrayed in the NAMBLA bulletins ... are such that they are

> out of the realm of most people's feelings about how sexual activity should be conducted and that the majority of the people that I have spoken to, who have spoken to me and offered their opinions, solicited or unsolicited, are firmly opposed to those views and beliefs; that it is detrimental to the school or any school to have a person who openly espouses those views, that it would be detrimental to the educational process, that the parents would not allow the school to operate if a person who had those opinions were in the school building and that many of the students would, in fact, opt not to report to a class if they were assigned to a man who had those opinions. For all of those reasons and for the other ones we mentioned about individual students who might feel reluctant to ask him questions or if they did on a personal basis after class ask him a question, that they might be subjected to ridicule ... I would not feel comfortable in having him return to Bronx High School of Science."

Joan Levenson, the co-president of Bronx Science's Parents' Association ("PA"), testified that if petitioner had been allowed to return to the classroom, the parents were prepared to "boycott [his] class, a sitdown strike in front of the school" (Tr. 1115). They would not have permitted their children to attend class (*id.*). In such manner, Levenson said, the parents "let the Board of Education know that [they] are not going to tolerate this kind of thing going on in the schools" (Tr. 1116). She explained (Tr. 1117, 1118):

> "The younger students might be intimidated. The older students would be obstreperous. They would want to show their macho, that they are not going to tolerate this kind of attitude in the school.

* * *

> "[T]here is a general order to a classroom, and the teacher is supposed to be the moral leader, the moral authority, and it's very difficult if students have a view of the teacher that is not a moral one. And he is supposed to act fairly and consistently, and students might not know what attitude to take with him, or what his attitude towards them would be."

Speaking of the PA co-presidents, Galasso noted that "they advised [him] ... that they would do whatever they could, whatever was possible to prevent [petitioner's return] and they included picketing the school, taking their kids out of the school and things like that" (Tr. 153). Galasso "felt they meant it" (Tr. 153) "[b]ecause of the vehemence with which it was said. This was not said casually. They were very, very upset. The look on their faces, the tone of their voice and they certainly characterized their feelings as being emotionally upset about the whole thing" (Tr. 154).

Galasso explained the effects of such a boycott (Tr. 208-09):

> "[I]f the parents, in fact, boycotted the school and picketed the school, then it is certainly reasonable to assume that a fairly large number of students might not come into the building especially if they felt the same way, and, therefore, the classes and education would be disrupted.
>
> * * *
>
> "[I]t would also be a public relations mess, because undoubtedly, the media would cover it and there would be more negative

> news about the school, education not occurring at the school. People have to apply to come into the school, they have to travel long distances a lot of times and it would not be an incentive for people to do that if they felt that the atmosphere in the school was chaotic. So, from all of those points of view, it would really be terrible if such an event occurred. The existence of the school depends upon the quality of the student, the program, the faculty and if anything gets messed up in that mix, then the school cannot exist anymore."

The Superintendent of Bronx High Schools concurred (Tr. 2282):

> "I believe that the parents, in fact, would demonstrate. That there would be a sense of disruption in that there would be protests ... there probably would be students who would not wish to attend their class and ... there would be a negative impact on not only [petitioner's] classes, but the school, caused by the attention that whatever demonstrations would occur, so that I think that there would be significant impact on disrupting the educational programming of the school."

The Superintendent also testified that he received "numerous phone calls where parents objected strenuously to [petitioner's] continuation as a teacher" (Tr. 2275). He could not condone petitioner's return to the classroom (Tr. 2281-82):

> "I believe that [petitioner's] participation and membership in NAMBLA has brought into question ... the trust factor that parents and students have with teachers. They rely on teachers to appropriately respond if they are made aware of situations of child abuse ... any kind of sexual misconduct and the

> like, and I believe there are now doubts in both students' and parents' minds about his ability to be able to do that and as such, I believe ... there is a significant sense of lack of trust and ability to properly protect the interest of students in the school."

At the hearing before the Arbitrator, respondent Board of Education ("Board") presented the testimony of Donald J. Lewittes, a PhD. in the field of clinical psychology (A459; see, A459-63).[3] Lewittes was qualified by the Arbitrator as an expert in pedophilia (Tr. 1825). As correctly understood by the Arbitrator, the Board sought his opinion on "what impact [petitioner] would have [on Bronx Science students] if he were in fact returned to the classroom given all the circumstances that occurred" (Tr. 1793).

Lewittes understood that neither NAMBLA nor its agenda had ever been mentioned in the classroom (Tr. 1809). He based his opinion, rather, on the assumption that petitioner's NAMBLA association "was common knowledge to the students" (*id.*). "Knowledge" he said, "whether garnered via direct confrontation or indirectly through public media can be extremely compelling to a student" (Tr. 1810). Thus, Lewittes opined that "it would be extremely upsetting to the average student to have a publicly announced message that ... a teacher of theirs endorsed an organization or was a member of an organization that endorsed having sexual acts that were considered illegal, immoral and unethical ... by society at large, by the student and by their families" (Tr. 1810-11).

Based upon his "experience and training and [his] research and knowledge of the field of ... adolescent development as well as child and adolescent

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[3] Numbers in parentheses preceded by "A" refer to pages of the appendix filed in the Second Circuit.

traumatization" (Tr. 747), Lewittes offered the following opinions as to the effects of petitioner's return to the classroom following the widespread media reports of his NAMBLA involvement.

> "[A]n adult in an authority position [who] has stated that sexual contact and acts between youngsters and adults is not only condoned but actually encouraged would be an extremely anxiety provoking and disruptive experience for the average child and adolescent to be subjected to in a relationship where they have less power, that is, as a student, where they are assigned, where they have no right or option themselves to control their destiny, where they are highly dependent upon this person to perform acts such as teaching and grading which involve[] their future and specifically having to do with the sexual identity and development of adolescents, the feelings engendered by knowing that an authority figure has encouraged the disavowal or disruption of legal and moral codes that their families and the general community hold.... These children would react with anxiety, with fear and ... the average adolescents in that situation would have strong feelings about being assigned to an authority teacher figure in that situation" (Tr. 1747-48).

> "[A] person who was a member of [NAMBLA] would create an understandable degree of anxiety in that student because if that teacher ... gave the student attention, if that teacher ... asked the student to stay after class to perform some duty, if that teacher in some way encouraged or smiled or winked or did what would be considered to be potentially normal behaviors by a person who did not have membership in that kind of an organization ... many adolescents would

fear that the attention and the affection that was being foisted upon them indicated in some way that they would potentially be singled out as a possible victim or a possible person who, because of their own characteristics, was identified by such a member as being of interest to them, meaning that their own identity and their own sexuality would be severely questioned by them as to why they had been chosen by this ... authority figure for this form of attention.

"In addition, [female] students might feel in some way slighted or in some sense of the word rejected .... [T]hey may believe that sexuality was the basis by which favors or grades or some other form of attention was given out ....

* * *

"Those are some of the areas that I think might be of concern to students, including the issue of sexual identity, sexual development, identification with one's school, self-esteem, feelings of anxiety, feelings of fear, inability to concentrate, inability to attend, inability to feel positive about themselves and their course work" (Tr. 1784-87)

"[A] teacher who has become so publicly associated with an organization which is so threatening to the normal adolescent's development that the student in the general body would have difficulty in attending and concentrating and doing their work .... [W]e know how people respond to anxiety .... [T]hey would either avoid such a stimulus, that is the teacher, they would either ask not to be in that teacher's class or if they were not able to avoid the anxiety-provoking

> stimulus, they would then escape ... either physically by not attending class or mentally by not paying attention or not enthusiastically getting involved ....
>
> "The average adolescent who was in a situation with a person who has power over them would ... feel that their safety was threatened, that their identification in the organization ... which is giving them an educational degree is seriously damaged and their ability to again be a student, that is ask questions, respond to questions, performing the duties of study, performing the duties of taking tests, participat[ing] after school in projects that this ... teacher might be involved in, all of these activities as a student ... would be severely interfered with and impacted on in a negative way and produce self-esteem issues in the general [student] population; that is, students who were known to go to a school that hires people or allows people to teach who are associated with organizations that endorse man-boy ... love. These students would ... have tremendous difficulties being able to ... perform the duties of a student" (Tr. 1802-03)

Lewittes graphically suggested that adolescent boys could have particularly strong reactions to petitioner's appearance in the classroom (Tr. 1806, 2217):

> "[A]cting out is very common to adolescents when they are angry, anxious and their identity has been challenged and ... an organization that supports sexuality between adults and children ... that is man and boy, is extremely unsettling and upsetting to the general male population.

* * *

> "[B]oys have a specific identity issue having to do with the same sex ... specifically having to do with adults who ... have power over them, who in some way use that authority, psychologically to manipulate ... this adolescent to in some way submit to a relationship or sexuality that they find repulsive and they find to be contrary to the values of their church, contrary to the values of their religion, contrary to the values of their family, and contrary to the morals of their society. That this would represent ... specific dissonance, highly upsetting, highly emotionally-charged reactions which could include actions that ... would potentially put this ... teacher's physical life in danger."[4]

Following the hearing, the Arbitrator issued a comprehensive 90-page Opinion and Award. He determined as follows with respect to the reaction of Bronx Science parents to the reports of petitioner's NAMBLA activities (Opinion and Award, at 81):

> "[T]his Arbitrator finds it significant that the parental fears that have been and will likely be raised should [petitioner] return to the classroom are based on more than 'irrational fear' or a disagreement with [petitioner's] views.... [Petitioner] had allowed himself, as a member of the Bulletin collective, to be associated with more than mere advocacy in changing or abolishing the age of consent

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[4] Lewittes opined that adolescent victims of abuse who were now repeating the cycle as "victimizers" might find in plaintiff a role model. Such adolescents "might indeed feel supported and utilize this form of modeling and this form of intellectual rationalization as a vehicle by which they could continue their own perpetration without any sense of censure or guilt or feeling of violation of moral code because here we have a person who has been given the honored position of teacher" (Tr. 1800-01).

> laws. [Petitioner's] role in NAMBLA ... extended to the endorsement, if not promotion, of actual sexual activity between man [*sic*] and underage youth in violation of the New York State Penal Law. Parental resistance to [petitioner's] return to the classroom ... is both understandable and reasonable based on factors other than [petitioner's] membership in NAMBLA *per se*."

Imposing the penalty of termination (A498), the Arbitrator said (A497):

> "[T]his Arbitrator finds that there are no reasonable means available to the [Board] to allow [petitioner] to return to the classroom and at the same time sufficiently address the concerns raised by parental and student fears in opposition.... While a number of the divisive issues of our times have required students and parents to make adjustments in their thinking and values to accommodate notions of equality and tolerance[,] this Arbitrator does not believe that the [Board], its students and their parents should be required to make such adjustments to accept and understand the thinking and/or behavior of a pedophile."

REASONS FOR DENYING THE PETITION

A. The *Pickering* balancing test is appropriately applied to a government employee's First Amendment activities notwithstanding that they occur "outside the workplace and [are] unconnected to it."

Of the three questions posed in the petition, only the third suggests even a colorable issue. However, that precise question was recently presented in a petition seeking certiorari to the Second Circuit in an action involving analogous relevant facts, and that petition was denied. *Pappas v. Giuliani*, 290 F3d 143 (2d Cir. 2002), *cert. denied sub nom Pappas v. Bloomberg*, __ US __, 156 L Ed 2d 657, 123 S Ct. 2642 (2003)("*Pappas*").

In *Pappas*, a New York City police officer was terminated when his after-hours, out-of-the-office "anonymous dissemination of bigoted racist anti-black and anti-semetic materials" (290 F3d at 144) was determined to risk harm to the Police Department "in the performance of its governmental mission." 290 F3d at 148. Applying the *Pickering* balancing test, the Second Circuit sustained the termination, concluding that "[t]he Department's reasonable perception of serious likely impairment of its performance of its mission outweighed Pappas's interest in free speech." 290 F3d at 151.

A comparison of the question posed in the *Pappas* petition with that in the instant petition demonstrates their essential identity:

Pappas	*Melzer*
Whether the United States Court of Appeals for the Second Circuit erred in holding that the diminished First Amendment protections accorded to public employees pursuant to *Pickering* ... and its progeny apply to private and anonymous expressive activity by public employees?	Does a public employee's speech that occurs outside the workplace and is unconnected to it deserve the same First Amendment protection as the speech of a private citizen?

In the instant case, petitioner argues (Petition, at 22):

> "[O]nly when a public employee speaks as an employee at the job or about the job, may the government-employer restrict the speech if it disrupts the government's place of business, but ... no such authority to restrict speech applies when a public employee speaks as a private-citizen member of the general public."

Similarly, in *Pappas*, the petitioner stated (*Pappas*, Petition, at 11, 16-17):

> "[T]he Second Circuit took the unprecedented step of extending the *Pickering* doctrine to anonymous and private expressive activity unrelated to a public employee's work or workplace.... [This] Court has endorsed the application of the *Pickering* exception only in cases in which the expressive activity at issue either took place in the workplace [citations omitted] or in which the employee was

> speaking about the workplace and was identified as being a public employee [citation omitted]. Th[is] Court has never suggested that *Pickering* applies to all expressive activity of public employees even if such expression bears no relationship to the employee's work and workplace."

As this Court denied the petition in *Pappas*, so the instant petition should be denied. The Second Circuit correctly applied the *Pickering* balancing test in each case, and petitioner's argument to the contrary is without merit. The *Pickering* test balances the First Amendment rights of a public employee, wherever they may be exercised, against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 US at 568.

It has consistently and appropriately been recognized that the State's "ability to perform its legitimate functions" (*Lewis v. Cowen,* 165 F3d 154 [2d Cir.], *cert.-denied*, 528 US 823 [1999]) may be critically undermined by "a public employee's speech that occurs outside the workplace and is unconnected to it." Petition, at i. *See Weicherding v. Riegel,* 160 F3d 1139 (7th Cir. 1998)(Applying the *Pickering* balancing test, the Court sustained the termination of a sergeant at a state prison who had "appeared on a local television newscast promoting a rally of the Ku Klux Klan .... During this broadcast, he was identified as a prison guard[.]" 160 F3d at 1141. The Court noted that the prison "has a racially charged environment, and avoiding racially motivated violence is essential to the efficient and safe operations of [the prison]." 160 F3d at 1143. Upon all of the circumstances, the Court concluded, "the state's interests in maintaining safety and avoiding racial violence at [the prison] outweighs [the plaintiff's] interests in associating with and promoting the Ku Klux Klan; we see no unconstitutional activity by the defendants." *Id.*); *Tindle v. Caudell*, 56 F3d

966 (8th Cir. 1995)(The Court sustained a 30-day suspension of a police officer who, while off-duty, attended a Halloween party "dressed in blackface, wearing bib overalls and a black, curly wig, and carrying a watermelon." 56 F3d at 968. If it were to reach the issue, the Court said, the *Pickering* balance would weigh in favor of the police department. "[T]he evidence in the record," the Court noted, "indicates that the potential for disruption was real." 56 F3d at 973. The Court found [56 F3d at 972]: "Under all the circumstances [the plaintiff's] interest in appearing as he chose at the party does not outweigh the countervailing interests in maintaining discipline and harmonious working relationships within [the police department]."); *McMullen v. Carson*, 754 F2d 936 (11th Cir. 1985)(Applying the *Pickering* balancing test, the Court sustained the termination of a clerical employee in the sheriff's office who "was fired after he was interviewed on a locally televised news broadcast as a recruiter for the Ku Klux Klan." 754 F2d at 936-37. The Court held [754 F2d at 940]: "[A] law enforcement agency does not violate the First Amendment by discharging an employee whose active participation in an organization with a history of violent activity, which is antithetical to enforcement of the laws by state officers, has become known to the public and created an understandably adverse public reaction that seriously and dangerously threatens to cripple the ability of the law enforcement agency to perform effectively its public duties.").

The point was crystallized by the Court in *Sims v. Metropolitan Dade County,* 972 F2d 1230 (11th Cir. 1992), wherein the Court sustained disciplinary measures against a black employee of the Dade County Department of Community Affairs. In his capacity as a preacher, the plaintiff had, from the pulpit, "made remarks that his supervisors at the Department felt were inappropriate in view of his position with the Department." 972 F2d at 1232. Notwithstanding that the plaintiff's comments were

"made while he was off-duty and in the pulpit" (972 F2d at 1233), the Court, applying the *Pickering* balancing test, concluded (972 F2d at 1238): "The First Amendment does not require that [the plaintiff] be allowed to continue his weekday employment drenching the fires of racial animosity for the Department while he fans those flames during his weekend sermons."

Finally, petitioner misplaces reliance on *United States v. National Treasury Employees Union*, 513 US 454 (1995). While the speech therein "d[id] not involve the subject matter of Government employment and [took] place outside the workplace" (513 US at 470), this Court sustained a First Amendment challenge to an attempt to curb that speech not on those grounds, but, rather, because "[t]he speculative benefits the ... ban may provide the Government are not sufficient to justify this crudely crafted burden on respondents' freedom to engage in expressive activities." 513 US at 477.

Not so in the instant case. Notwithstanding that petitioner's "freedom to associate with and advocate for NAMBLA is protected by the First Amendment" (*Melzer,* 336 F3d at 200 [69a]*),* and notwithstanding that such activity was "conducted away from the workplace and not concerning the workplace" (Petition, at 18), respondents met their burden under *Pickering* "by demonstrating that [petitioner's] association and his degree of active involvement in NAMBLA caused disruption to the school's mission and operations justifying the Board's action terminating him." *Melzer,* 336 F3d at 200 (69a).

Petitioner's contention that speech that occurs outside the workplace deserves the same First Amendment protection as the speech of a private citizen does not present an issue necessitating this Court's review and, in any event, is without merit. The petition should be denied.

B. The Second Circuit correctly failed to "perceive an impermissible heckler's veto implicated in this case." Rather, public knowledge of petitioner's "association and his degree of involvement in NAMBLA" caused "internal disruption to the operation of the school ... justifying the Board's action terminating him."

Petitioner's first question, which erroneously presupposes a finding by the Second Circuit that "the threat of a heckler's veto can outweigh First Amendment rights" (Petition, at 7) is not presented by either the record or the Second Circuit's opinion. Indeed, the Circuit explicitly distinguished the impact of parents in the instant case from a "heckler's veto," as follows (336 F3d at 199 [68a]):

> "... Melzer's position as a teacher leaves him somewhat beholden to the views of parents in the community. Parents are not outsiders seeking to heckle Melzer into silence, rather they are participants in public education, without whose cooperation public education as a practical matter cannot function. Any disruption created by parents can be fairly characterized as internal disruption to the operation of the school, a factor which may be accounted for in the balancing test and which may outweigh a public employee's rights. In consequence, we do not perceive an impermissible heckler's veto implicated in this case."

The Circuit further made a particular finding that respondents reasonably anticipated that negative parental reaction to the news of petitioner's activities could cause significant internal disruption. The Court said (336 F3d at 198-99 [66a-67a]):

> "It is ... entirely reasonable for the Board to believe that many parents and students had a strong negative reaction to [petitioner], and

> that such a reaction caused the school severe internal disruption....
>
> * * *
>
> "Melzer's position as a school teacher is central to our review. He acts in loco parentis for a group of students that includes adolescent boys [citation omitted]. At the same time he advocates changes in the law that would accommodate his professed desire to have sexual relationships with such children. We think it is perfectly reasonable to predict that parents will fear his influence and predilections. Parents so concerned may remove their children from the school, thereby interrupting the children's education, impairing the school's reputation, and impairing educationally desirable interdependency and cooperation among parents, teachers, and administrators. The Board contends as well that parental concern will compromise the competitive position of this high school via-a-vis other elite high schools in New York City. While not a central concern, this also matters.

Contrary to petitioner's contention, the purported conflict among the Circuits does not exist. Thus, in contrast to the Second Circuit's finding in the instant case, the Court in *Berger v. Battaglia,* 779 F2d 992 (4th Cir. 1985), *cert. denied,* 476 US 1159 (1986), specifically found that the First Amendment activity in question therein did not cause any "internal disruption" to the operation of the police department. 779 F2d at 1000. The Court made a similar finding in *Flanagan v. Munger,* 890 F2d 1557 (10th Cir. 1989)("The record is devoid of evidence of actual, or potential, disruption of the department's internal operation – no discipline problems, no disharmony, no impact on close working relationships, and no performance problems by plaintiffs." 890 F2d at 1566.)

Of particular relevance in this regard is the fact that an almost identical argument was made in the certiorari petition in *Pappas*, with the petitioner therein, citing the same cases, relying upon an alleged conflict. See, *Pappas*, Petition, at 19-27. As does petitioner herein (Petition, at 6), the petitioner in *Pappas* argued that the Second Circuit's decision in that case "squarely conflicts with the rulings of the Fourth and Tenth Circuits." *Pappas*, Petition, at 26. As this Court denied the petition in *Pappas*, so it should deny the instant petition.

C. The Second Circuit correctly determined that respondents had carried their burden of demonstrating the reasonable likelihood of internal "disruption to the school's mission and operations" attributable to public knowledge of petitioner's active involvement in NAMBLA.

Similarly, petitioner's second question finds no basis in either the record or the opinion of the Second Circuit. Petitioner's gratuitous attack on respondent's expert witness at the administrative hearing is not supported by the record. Lewittes testified at length on direct examination, and he was subjected to vigorous and probing cross-examination. The Arbitrator found him to be credible, and he credited such testimony "over the testimony of [petitioner's] expert" to the extent that the experts were in conflict. Opinion and Award, at 85. Lewittes's testimony, the Arbitrator determined, "establishes that both parents and the [Board] would have legitimate fears based on more than mere speculation, that [petitioner's] return to the classroom would cause difficulties to at least some students that both the parents and the [Board] could reasonably believe should not be part of a child's educational experience" (A491).

Referring to Lewittes's testimony, the District Court stated (196 F Supp 2d at 251 [43a]):

> "The Court attaches particular significance to the concerns of the student body, as articulated at its meetings, that students would not be able to concentrate in a classroom taught by a teacher who they knew advocated sex between men and boys, nor comfortably interact with the teacher, and the likelihood that students would refuse to attend Melzer's classes. In that regard, the Court credits the testimony of Dr. Lewittes that it would be 'an extremely anxiety provoking and disruptive experience for the average child and adolescent' to be subjected to the feeling engendered by knowing that a teacher 'has encouraged the disavowal or disruption of legal and moral codes that their families and the general community hold.'"

The Second Circuit also referred to Lewittes's testimony, noting (336 F3d at 198 [66a]):

> "An expert in psychology testifying for the Board stated that having a teacher with beliefs such as Melzer's would provoke anxiety and be a disruptive experience for the average student. He believed students would likely be unable to concentrate in [petitioner's] class or be uncomfortable asking him for help after class or in any other one-on-one situation."

Petitioner's self-serving conclusion that the evidence adduced by respondents is speculative should be rejected out-of-hand. *See Waters v. Churchill*, 511 US 661, 673 (1994)(plurality opinion)("[W]e have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed involve tangible, present interference with the

agency's operation. The danger in them is mostly speculative.... But we have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential."); *Connick v. Myers*, 461 US 138, 152 (1983)("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.").

Finally, the Second Circuit's determination was predicated not on a single piece of evidence, but, rather, upon its *de novo* review of the entire record. *See Melzer*, 336 F3d at 198 (65a). That Court's conclusion that the *Pickering* balance weighs in favor of respondents, and that, therefore, petitioner's First Amendment rights were not violated, is not in conflict with any Circuit opinion, and it does not warrant further review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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Respectfully submitted,

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